Supreme Court, U.S.
FILED
FEB 11 1997
CLERK

No. 96-651

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAMES E. GILBERT, PRESIDENT, EAST STROUDSBURG UNIVERSITY, ET AL., PETITIONERS

v.

RICHARD J. HOMAR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
SETH P. WAXMAN
Deputy Solicitor General
STEPHEN W. PRESTON
Deputy Assistant Attorney General
DAVID C. FREDERICK
Assistant to the Solicitor General
WILLIAM KANTER
JEFFRICA JENKINS LEE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

LORRAINE P. LEWIS
General Counsel
MARY S. MITCHELSON
Deputy General Counsel
STEVEN E. ABOW
Senior Attorney
Office of Personnel Management
Washington, D.C. 20415

QUESTION PRESENTED

Whether a public employer must always provide a hearing before suspending an employee without pay if the suspension is followed by a hearing within a reasonable time.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	11
Argument:	
I. The court below erred in mandating pre-deprivation hearings in all cases in which a public employee is suspended without pay	12
A. This Court has consistently maintained that procedural due process requirements must be applied flexibly to meet particular circumstances	13
B. A pre-suspension hearing is not required so long as the government's interest in postponing proceedings is weighty and adequate post-deprivation procedures are provided	14
C. A rule requiring pre-suspension hearings in all cases could threaten legislative choices reasonably made by Congress affecting federal employees	21
II. The case should be remanded for consideration of the adequacy of post-suspension proceedings	23
Conclusion	26

TABLE OF AUTHORITIES

Cases:

Ambus v. *Granite Bd. of Educ.*, 975 F.2d 1555 (1992), aff'd as modified on rehearing, 955 F.2d 992 (10th Cir. 1993)	10, 16
Arnett v. *Kennedy*, 416 U.S. 134 (1974)	19

Cases—Continued: Page

Bailey v. *Board of County Comm'rs*, 956 F.2d 1112 (11th Cir. 1992) 16
Barry v. *Barchi*, 443 U.S. 55 (1979) 11, 15, 25
Boddie v. *Connecticut*, 401 U.S. 371 (1971) 23
Boykin v. *Bloomsburg Univ.*, 893 F. Supp. 378 (M.D. Pa. 1995) 21
Bradley v. *Pittsburgh Bd. of Educ.*, 913 F.2d 1064 (3d Cir. 1990) 10
Cafeteria & Restaurant Workers Union v. *McElroy*, 367 U.S. 886 (1961) 14, 18
Caine v. *Hardy*, 943 F.2d 1406 (5th Cir. 1991), cert. denied, 503 U.S. 936 (1992) 16
Cleveland Bd. of Educ. v. *Loudermill*, 470 U.S. 532 (1985) ..... *passim*
Engdahl v. *Department of Navy*, 900 F.2d 1572 (Fed. Cir. 1990) 10
Everett v. *Napper*, 833 F.2d 1507 (11th Cir. 1987) 10, 16
FDIC v. *Mallen*, 486 U.S. 230 (1988) 10, 11, 14, 15, 20, 25
Goldberg v. *Kelly*, 397 U.S. 254 (1970) 14, 19
Jones v. *City of Gary*, 57 F.3d 1435 (7th Cir. 1995) 10, 16
Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982) 8
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 11, 12, 13, 14, 19, 20, 25
Meachum v. *Fano*, 427 U.S. 215 (1976) 13
Morrissey v. *Brewer*, 408 U.S. 471 (1972) 13, 14, 18
National Treasury Employees Union v. *United States Merit Sys. Protection Bd.*, 743 F.2d 895 (D.C. Cir. 1984) 1
Strong v. *Board of Educ.*, 902 F.2d 208 (2d Cir. 1990) 16

Cases—Continued: Page

United States Dep't of Justice, INS v. *FLRA*, 709 F.2d 724 (D.C. Cir. 1983) 22

Constitution, statutes and regulations:

U.S. Const.:
Amend. V (Due Process Clause) ..... *passim*
Amend. XIV (Due Process Clause) ..... *passim*
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 2
5 U.S.C. 1101-1104 1
5 U.S.C. 1101-1105 2
5 U.S.C. 1201-1206 2
5 U.S.C. 2102 3
5 U.S.C. 2103 3
5 U.S.C. 2108(3) 4
5 U.S.C. 2301 2
5 U.S.C. 2302 2
5 U.S.C. 3132(a)(2) 3
5 U.S.C. 3321 3
5 U.S.C. 4303 2
5 U.S.C. 7501-7543(Ch. 75) 2, 4
5 U.S.C. 7501 3
5 U.S.C. 7501(1) 3
5 U.S.C. 7501(2) 4, 15
5 U.S.C. 7503 ..... 3, 22
5 U.S.C. 7503(a) 3, 4
5 U.S.C. 7503(b) 4, 22
5 U.S.C. 7511 3
5 U.S.C. 7511(a)(1)(C) 4
5 U.S.C. 7512 4
5 U.S.C. 7513 ..... 3, 4, 22
5 U.S.C. 7513(a) 3
5 U.S.C. 7513(b) 5, 22
5 U.S.C. 7513(b)(2) 5
5 U.S.C. 7513(c) 5
5 U.S.C. 7521(a) 4
5 U.S.C. 7532 5
5 U.S.C. 7532(a) 5, 23

Statutes and regulations:	Page
5 U.S.C. 7532(c)	5, 23
5 U.S.C. 7542	4
5 U.S.C. 7543	3, 4
5 U.S.C. 8332(f)	18
12 U.S.C. 1818(g)(1) (1982)	15
5 C.F.R. (1996):	
Pt. 315:	
Section 315.801(a)	3
Section 315.804	21
Section 315.805	22
Section 315.805(a)	22
Section 315.805(b)	22
Section 315.907(a)	21
Section 315.907(c)	21
Section 315.908(a)	21
Section 515.908(b)	21
Pt. 752	1, 3, 4
Section 752.201-752.203	4
Section 752.203	4, 22
Section 752.203(c)	4
Section 752.404	22
Section 752.404(d)(1)	5
Pt. 870:	
Section 870.501(d)	18
Section 890.303(e)	18
Section 890.502(b)(1)	18

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-651

JAMES E. GILBERT, PRESIDENT, EAST STROUDSBURG UNIVERSITY, ET AL., PETITIONERS

v.

RICHARD J. HOMAR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

With almost two million workers, the federal government is the nation's largest employer. The Office of Personnel Management (OPM) serves as the "central personnel office of the executive branch" and is responsible for government-wide oversight of the federal civil service system. *National Treasury Employees Union* v. *United States Merit Sys. Protection Bd.*, 743 F.2d 895, 899 (D.C. Cir. 1984); 5 U.S.C. 1101-1104. Pursuant to its statutory authority, OPM has promulgated a detailed and comprehensive set of regulations governing federal personnel management, including the discipline of employees. 5 C.F.R. Pt. 752. In this case, the court of appeals cited *Cleveland*

Board of Education v. *Loudermill*, 470 U.S. 532 (1985), to state a blanket rule "that a governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard." Pet. App. 14a. The procedural safeguards currently provided in routine federal disciplinary actions generally comport with the court's rule. Nevertheless, the United States has an interest in assuring that *Loudermill*, which involved a termination, is not improperly extended to suspension cases in a manner that "intrude[s] to an unwarranted extent" on the federal government's needed flexibility to address employee misconduct in situations not adequately contemplated by the court of appeals. See *Loudermill*, 470 U.S. at 546.

STATEMENT

This case concerns what process is due before a public employee may be suspended without pay for misconduct.

1. Personnel management in the federal sector is governed by the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified in various sections of 5 U.S.C.). The CSRA replaced the Civil Service Commission with two agencies, OPM (5 U.S.C. 1101-1105) and the Merit Systems Protection Board (MSPB) (5 U.S.C. 1201-1206); it codified merit systems principles and prohibited personnel practices (5 U.S.C. 2301, 2302); and it established procedures for adverse personnel actions (5 U.S.C. 4303, 7501-7543).

In cases involving misconduct, Chapter 75 of the CSRA establishes the standards and procedures governing removals, demotions, suspensions, and other

adverse actions initiated to "promote the efficiency of the service." 5 U.S.C. 7503(a), 7513(a). In addition to authorizing the circumstances and manner in which the federal government handles employee misconduct, the CSRA and implementing regulations provide federal employees with specific substantive rights in such proceedings. See 5 U.S.C. 7503, 7513; 5 C.F.R. Pt. 752. The substantive rights and procedural protections to which any particular employee is entitled depend upon the employee's classification within the three groups of Senior Executive Service, competitive service, and excepted service.[1] In general, the CSRA provides more extensive rights and protections to tenured or nonprobationary employees than it provides to probationary employees. Compare 5 U.S.C. 7501, 7503, with 5 U.S.C. 7511, 7513, 7543.[2]

---

[1] The "Senior Executive Service" covers employees in high-level agency positions for whom appointment by the President and Senate confirmation is not required. 5 U.S.C. 3132(a)(2). "Competitive service" employees are all other employees for whom nomination by the President and Senate confirmation are not required, and who are not specifically excepted from the competitive service. 5 U.S.C. 2102. "Excepted service" employees hold civil service positions that are not in the competitive service or the Senior Executive Service. 5 U.S.C. 2103. Before an appointment in the competitive service becomes final, the employee must serve a one-year probationary or trial period. 5 U.S.C. 3321; 5 C.F.R. 315.801(a).

[2] With respect to an adverse action involving a suspension for 14 days or less, the CSRA excludes individuals in the excepted service and probationers from the definition of "employee." See 5 U.S.C. 7501(1). The CSRA includes individuals in the excepted service in the definition of "employee" with respect to the rights and procedures available in the case of an adverse action such as removal, suspension for more than 14

Pursuant to the CSRA and OPM regulations (5 C.F.R. Pt. 752), a nonprobationary employee in the competitive service may be suspended[3] for 14 days or less "for such cause as will promote the efficiency of the service." 5 U.S.C. 7503(a); 5 C.F.R. 752.201-752.203.[4] When such action is proposed, the employee is entitled to the following procedural rights before a suspension takes effect: (1) advance written notice of the specific reasons for the proposed action; (2) a reasonable time to answer orally and in writing; (3) representation by an attorney or other representative; and (4) a written decision and the specific reasons therefor at the earliest practicable date." 5 U.S.C 7503(b). OPM regulations deem a "reasonable time to answer" the charges as "not less than 24 hours." 5 C.F.R. 752.203(c).

When the proposed adverse action involves removal, suspension for more than 14 days, reduction in grade or pay or furlough for 30 days or less, an employee has greater procedural rights under the statute—particularly following suspension. 5 U.S.C. 7512, 7513. An

---

days, or demotion. See 5 U.S.C. 7511(a)(1)(C). Even for those more severe actions, however, the CSRA continues to exclude probationers from the statutory definition of "employee." Within each of the three main employment classifications, the CSRA accords special treatment to "preference eligible" employees (*i.e.*, veterans and sometimes the spouse and mother of a veteran). 5 U.S.C. 2108(3).

[3] " '[S]uspension' means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay." 5 U.S.C. 7501(2).

[4] The substantive and procedural rights of administrative law judges (ALJs) and employees in the Senior Executive Service facing disciplinary action are addressed elsewhere in Chapter 75. See 5 U.S.C. 7521(a) (ALJs), 7542, 7543 (Senior Executives).

employee facing such an action is entitled to at least 30 days' advance written notice (unless there is reasonable cause to believe a criminal offense has been committed), reasonable time in which to answer, representation, and a written decision at the earliest practicable date—all before suspension occurs. 5 U.S.C. 7513(b); 5 C.F.R. 752.404(d)(1).[5] The requirement of 30 days' advance written notice does not apply when such action is deemed by the agency head to be in the interests of national security. See 5 U.S.C. 7532. A permanent, nonprobationary employee who is a United States citizen and has been suspended pursuant to Section 7532(a) and against whom removal is proposed is entitled to invoke post-suspension procedures, such as hearing and review by the head of the agency. 5 U.S.C. 7532(c).

2. Respondent Richard Homar was arrested during a drug raid at a friend's home on August 26, 1992, and was charged in a criminal complaint that same day with possession of marijuana, possession with intent to deliver, and criminal conspiracy. At the time, Homar was employed as a police officer at East Stroudsburg University (ESU).[6] The Pennsylvania state police notified Homar's supervisor of the arrest and charges against him. Petitioner Gerald Levanowitz, ESU's Director of Human Resources, decided immediately to suspend Homar without pay.

---

[5] The employing agency may also provide by regulation for a hearing in lieu of or in addition to the opportunity to answer provided in 5 U.S.C. 7513(b)(2). See 5 U.S.C. 7513(c).

[6] Respondent alleges in his complaint, and petitioners do not dispute, that he was fully tenured in his position as an ESU police officer, having completed a six-month probationary period in accordance with the collective bargaining agreement between respondent's union and ESU. C.A. App. 10-11, 20.

Homar, however, chose not to report for work that day, and the next day, August 27, he telephoned a university official and asked whether he had been suspended. Pet. App. 50a. The official confirmed that he had been, and advised that Homar would receive a letter that day stating that he had been suspended without pay pending further investigation and the disposition of the criminal charges. The letter informed Homar that any administrative action taken would not necessarily coincide with disposition of the criminal charges against him. *Ibid.* All criminal charges against Homar were dismissed on September 1, 1992. *Id.* at 52a.

The university proceeded with its own investigation. On September 11, 1992, Levanowitz met with the state trooper who had signed the criminal complaint against Homar. The trooper provided Levanowitz with a copy of a page from the state police's "Supplemental Report" of the incident. The report stated that Homar had allegedly admitted knowledge of his friend's drug dealing and that he had received marijuana for his own use while employed as an ESU police officer. Levanowitz telephoned Homar, and arranged to meet with him on September 18. Levanowitz advised Homar that the meeting would be an administrative hearing at which he would be entitled to union representation. Pet. App. 52a-54a.

At the meeting on September 18, 1992, Levanowitz told Homar that the state police had given him some evidence "very serious in nature." He offered Homar the opportunity to present his side of the story. He did not, however, inform Homar of the Supplemental Report containing his alleged confession. Pet. App. 54a.

By letter dated September 23, 1992, Levanowitz notified Homar that he was being demoted from the position of police officer to the position of groundskeeper "effective retroactive to August 26, 1992." Pet. App. 54a-55a. The letter also advised Homar that he would "be given back pay to that date at the rate of pay for a Groundskeeper." *Id.* at 55a.[7] The letter stated that the adverse action was being taken "*as a result of admissions made by yourself to the Pennsylvania State Police on August 26, 1992 that you maintained associations with individuals whom you knew were dealing in large quantities of marijuana and that you obtained marijuana from one of those individuals for your own use.*" *Ibid.* Although the letter purported to make the demotion retroactive, in fact it did not take effect until after September 24. "Homar consequently does not claim that he lost pay or benefits during the period of his suspension." *Id.* at 56a.

After receiving the letter and the Supplemental Report, Homar and his union representative met with ESU's president, petitioner Gilbert, who provided Homar an opportunity to respond to the charges and to Levanowitz's decision. Gilbert then sustained the suspension. Pet. App. 6a.

3. When union grievance procedures failed to achieve a satisfactory outcome for Homar, he filed a complaint in federal district court pursuant to 42 U.S.C. 1983 against the university officials alleging violations of his constitutional rights. In particular,

---

[7] ESU later paid respondent additional backpay for the difference between a police officer's salary and that of a groundskeeper after intervention from respondent's employee union. Pet. App. 55a-56a.

Homar asserted that petitioners' failure to give him a hearing before suspending him without pay violated his right to procedural due process.[8]

The district court granted summary judgment in favor of petitioners, holding that Homar received adequate procedural due process. Although both sides had relied on *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985), the court distinguished that case on the ground that Homar had not been terminated; rather, he had been suspended and then demoted. Pet. App. 59a. The court expressed uncertainty over whether due process protections extend to employment discipline short of termination; since neither party had addressed the issue, however, the court presumed that Homar had a protected property interest in his position as an ESU police officer. *Ibid.* Citing *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982), the court weighed the competing interests involved and concluded that, while the private interest was strong, "the deprivation incident to a suspension was only temporary and of a relatively brief duration (approximately one month)." Pet. App. 60a. Given the undisputed fact of Homar's arrest on drug-related charges, the district court opined that the risk of governmental error was slim and that the governmental interest in preserving public confidence in law enforcement was compelling. *Ibid.* After noting that Homar was eventually awarded full back-

---

[8] Respondent also averred that the hearing preceding his demotion was procedurally inadequate; that his suspension and demotion violated his substantive due process rights; and that he was also deprived of protected liberty interests. Because petitioner did not raise those issues in the petition for a writ of certiorari, the court of appeals' disposition of those issues is not before this Court.

pay and benefits for the period of the suspension, the court concluded that, "[a]t most, he was denied the use of his salary for a very brief period of time" and that "[t]o recognize a cause of action for denial of due process under these circumstances would clearly elevate form over substance." *Id.* at 62a. Accordingly, the court granted summary judgement for the defendant "because the alleged deprivation was *de minimus*." *Id.* at 63a.

4. In a split decision, the court of appeals reversed. The court noted that no dispute existed over whether Homar had a protected property interest in his employment, Pet. App. 9a, and it agreed with the district court that a compelling governmental interest supported ESU's decision to suspend Homar immediately and without a hearing pending further investigation, *id.* at 11a. Nonetheless, the court concluded that "Homar's due process rights were violated because he was suspended *without pay*." *Ibid.* (emphasis in original). In the court's view, "*Loudermill* strongly suggests that suspension without pay must be preceded by notice and an opportunity to be heard in *all instances*." *Ibid.* (emphasis added). The court therefore declared: "Today we clearly enunciate that a governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard." *Id.* at 14a. Such a rule, the court opined, "is not only consistent with, and suggested by, *Loudermill*, but it is also eminently sensible" in light of the balancing of governmental and employee interests at stake. *Ibid.*[9]

---

[9] The court acknowledged that the other courts of appeals "which have examined this language in *Loudermill* have dis-

The court of appeals disagreed with the district court's conclusion that, because Homar later received full pay and benefits for the period of his suspension, he was essentially suspended "with pay." Relying on *Bradley* v. *Pittsburgh Board of Education*, 913 F.2d 1064, 1077 (3d Cir. 1990), the court stated that the subsequent awarding of backpay does not remedy a due process violation. Pet. App. 15a-16a. Finally, the court rejected the district court's conclusion that Homar's suspension without pay could be viewed as "*de minimis*," because "[f]or a period of approximately one month, Homar's very livelihood was threatened because he received no salary." *Id.* at 16a. Accordingly, the court held that the district court erred in granting summary judgment in favor of petitioners on this issue.

Judge Alito dissented from the court's holding that a pre-suspension hearing was required. Pet. App. 29a-36a. Relying principally on *FDIC* v. *Mallen*, 486 U.S. 230, 240-241 (1988), Judge Alito reasoned that the need for prompt action in this case justified postponing the opportunity to be heard until after the suspension.

---

agreed with regard to its precise mandate." Pet. App. 11a. The court contrasted *Everett* v. *Napper*, 833 F.2d 1507, 1512 (11th Cir. 1987) (pre-suspension hearing required under *Loudermill* where employee was not paid during suspension), with *Engdahl* v. *Department of Navy*, 900 F.2d 1572, 1578 (Fed. Cir. 1990) ("[W]e cannot read *Loudermill* as holding that the government *must* suspend * * * *with pay*."). Pet. App. 11a-12a. The court below also noted that other circuits have on occasion allowed suspension without pay to stand in the absence of a pre-deprivation hearing, but without explicitly addressing *Loudermill*. *Id.* at 12a (citing *Jones* v. *City of Gary*, 57 F.3d 1435, 1436 (7th Cir. 1995); *Ambus* v. *Granite Bd. of Educ.*, 975 F.2d 1555, 1558, 1562 (1992), aff'd as modified on rehearing, 995 F.2d 992 (10th Cir. 1993) (en banc)).

Pet. App. 29a. Judge Alito found no requirement in the case law that a public employee must pay its suspended employees or provide them with a pre-deprivation hearing. *Id.* at 30a.

SUMMARY OF ARGUMENT

I. The court of appeals erred by ruling that a hearing is always required before a public employer may suspend an employee without pay. This Court has consistently held that procedural due process is a flexible concept that requires a balancing of the private and public interests that are affected. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976). Such flexibility is needed because the process due in any particular circumstance will depend upon the nature of the deprivation sustained and the public interests supporting the process afforded.

A per se rule that would apply in all cases involving suspension without pay is also inconsistent with the reasoning of *FDIC* v. *Mallen*, 486 U.S. 230 (1988), and *Barry* v. *Barchi*, 443 U.S. 55 (1979), which upheld pre-hearing suspensions so long as adequate hearings followed promptly thereafter. In distinguishing those cases, the court below believed that language in *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985), "strongly suggests" that "suspension without pay must be preceded by notice and an opportunity to be heard in all instances." Pet. App. 11a. *Loudermill*, however, does not support a per se rule that a hearing must always be held before an employee is suspended without pay. Nor do this Court's decisions support the position that the indefiniteness of a property loss will compel a pre-deprivation hearing. See, *e.g.*, *Mallen*, 486 U.S. at 243.

Adoption of a per se rule would unnecessarily cast doubt on the constitutionality of certain aspects of the federal employee management scheme. Under the federal system, employees who have not completed one year of service may be suspended and/or terminated without prior notice and without any type of hearing. Similarly, employees suspected of threatening national security may be summarily suspended without pay, with the opportunity only for a post-suspension hearing.

II. Because the court below relied on a bright-line rule, it did not engage in the appropriate balancing of interests required by *Mathews* and its progeny. Accordingly, the case should be remanded for a determination of the precise nature of the deprivation sustained by Homar, the interests asserted by petitioners in suspending Homar without pay, and a balancing of the public and private interests to determine whether the post-suspension hearing procedures provided by petitioners comported with constitutional due process standards.

ARGUMENT

I. THE COURT BELOW ERRED IN MANDATING PRE-DEPRIVATION HEARINGS IN ALL CASES IN WHICH A PUBLIC EMPLOYEE IS SUSPENDED WITHOUT PAY

The court of appeals concluded that petitioners were fully justified in suspending Homar immediately and without a hearing after learning of his arrest on drug charges. Pet. App. 11a. But the court held that Homar's procedural due process rights were violated by petitioners' failure to give him an adequate opportunity to be heard prior to suspending him *without pay*. *Ibid.* In so doing, the court announced a general,

per se rule that "a governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard." *Id.* at 14a. The court erred in imposing this per se rule.

A. This Court Has Consistently Maintained That Procedural Due Process Requirements Must Be Applied Flexibly To Meet Particular Circumstances

Procedural due process constrains governmental actions that deprive individuals of "liberty" or "property" within the meaning of the Fifth and Fourteenth Amendments. *Mathews* v. *Eldridge*, 424 U.S. 319, 332 (1976). However, due process is not implicated every time an individual suffers a deprivation from government action. Thus, traditional due process analysis requires that the examining court identify the property interest created by law, because even a "grievous loss" will not trigger due process protection in the absence of a protected interest. See, *e.g.*, *Meachum* v. *Fano*, 427 U.S. 215, 224 (1976).

Only "[o]nce it is determined that due process applies" is it appropriate to ask "what process is due." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). The process due in any given circumstance will entail a balancing of the governmental and private interests that are affected. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. at 334. Under *Mathews*, the specific dictates of due process generally require consideration of three distinct factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and

(3) "the Government's interest, including the [governmental] function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335 (citing *Goldberg* v. *Kelly*, 397 U.S. 254, 263-271 (1970)).

It is well settled that "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961). Instead, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey*, 408 U.S. at 481. Flexibility in treatment is a necessary element of due process because "not all situations calling for procedural safeguards call for the same kind of procedure." *Ibid.* By imposing a per se rule that applies in all cases in which a public employer suspends an employee without pay, the court below failed to take account of these fundamental tenets.

B. A Pre-suspension Hearing Is Not Required So Long As The Government's Interest In Postponing Proceedings Is Weighty And Adequate Post-deprivation Procedures Are Provided

1. This Court has never directly addressed the question of what process must be afforded to a tenured public employee before he is suspended without pay. Nevertheless, the Court has generally recognized in suspension cases outside the public employment context that the governmental interest may be sufficiently weighty to warrant postponement of a hearing until after the initial deprivation. See, *e.g.*, *FDIC* v. *Mallen*, 486 U.S. 230, 240 (1988). In *Mallen* the Court reasoned that Congress had acted in a constitutionally appropriate manner by providing

for the prompt suspension of bank officers—with hearings available thereafter—because of the need to protect the interests of depositors and to maintain public confidence in banks. *Ibid.* That the statute under scrutiny permitted up to 90 days for completion of the post-deprivation hearing process did not alter the Court's conclusion. *Id.* at 243-244.

The court below distinguished *Mallen* on the basis that it was unclear whether the suspension in that case was without pay. See Pet. App. 12a n.2. Although the specific provision at issue in *Mallen* does not define the term "suspension," see 12 U.S.C. 1818(g)(1) (1982), it does provide that the agency may "suspend [the officer] *or* prohibit him from further participation in any manner in the conduct of the affairs of the bank," *ibid.* (emphasis added). And federal personnel statutory law defines "suspension" as "the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay." 5 U.S.C. 7501(2). Indeed, the Court's discussion in *Mallen* of the private interests at stake emphasizes the "severity of depriving someone of his or her livelihood." 486 U.S. at 243. The court below therefore lacked any persuasive basis for concluding that the suspension in *Mallen* was with pay.

Similarly, in *Barry* v. *Barchi*, 443 U.S. 55, 66 (1979), the Court weighed the reliance of the horse trainer on his license to earn a living. The Court held, however, that the State could suspend the license without a pre-suspension hearing so long as it made hearing procedures available promptly thereafter.[10] A

---

[10] The Court's conclusion that the post-suspension hearing procedures were inadequate was entirely distinct from its balancing of the respective private and public interests in deter-

substantial majority of the lower federal courts have adopted the position that a pre-deprivation hearing is not always necessary when a public employee has been suspended without pay.[11]

2. The court below placed primary reliance on a statement in *Loudermill* that "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by *suspending with pay*." Pet. App. 11a (quoting

---

mining that a pre-suspension hearing was unnecessary. See 443 U.S. at 63-64.

[11] *E.g.*, *Jones* v. *City of Gary*, 57 F.3d at 1442 (successive suspensions of AWOL city fire fighter without pay and without pre-suspension hearing sustained where the post-deprivation hearing was found to provide adequate protection of employee's due process rights in light of governmental employer's overriding interests in public safety); *Ambus* v. *Granite Bd. of Educ.*, 975 F.2d at 1562 ("the substantiated knowledge that a teacher had been arrested for drug sales raised a substantial government interest justifying immediate suspension without pay; *Caine* v. *Hardy*, 943 F.2d 1406, 1412 (5th Cir. 1991) (en banc), ("Not even an informal hearing * * * must precede a deprivation undertaken to protect the public safety."), cert. denied, 503 U.S. 936 (1992); cf. *Bailey* v. *Board of County Comm'rs*, 956 F.2d 1112, 1123-1124 (11th Cir. 1992) (state officials were entitled to qualified immunity where corrections facility guard failed to show that he had a clearly established constitutional right to a pre-deprivation hearing prior to suspension without pay following his arrest on corruption charges); *Strong* v. *Board of Educ.*, 902 F.2d 208, 211-212 (2d Cir. 1990) (no due process violation found where adequate post-deprivation procedures were available to teacher barred from returning to classroom for refusing to provide medical evidence of fitness for duty following extended sick leave). Contra *Everett* v. *Napper*, 833 F.2d 1507, 1512 (11th Cir. 1987) (holding, without analysis, that pre-suspension hearing was required under *Loudermill* prior to fire fighter's suspension without pay for refusing to submit to urinalysis).

470 U.S. at 544-545) (emphasis added by court of appeals). In extrapolating this language into a per se rule that "suspension without pay must be preceded by notice and an opportunity to be heard in all instances," Pet. App. 11a, the court erred on several counts.

a. First, the court misperceived the context in which the *Loudermill* Court discussed the option of a "suspension with pay." That language was presented in a discussion of procedural alternatives a public employer could use prior to terminating the employee.[12] The holding of *Loudermill* reaffirmed that due process "requires 'some kind of a hearing' prior to the *discharge* of an employee who has a constitutionally protected property interest in his employment." 470 U.S. at 542 (emphasis added). The Court concluded that some form of pretermination hearing was needed because the governmental interest in immediate termination did not outweigh the significant private interest in retaining employment and the value of permitting the employee to present a response to the allegations of misconduct. *Id.* at 543-544. As the Court explained:

> [A]ffording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled,

---

[12] It is unclear whether the Third Circuit found *Loudermill* to be controlling because it viewed respondent's demotion as the equivalent of a termination, see Pet. App. 9a, or because the court viewed the suspension without pay as tantamount to a discharge. *Id.* at 11a.

> the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a qualified employee on than to train a new one. * * * Finally, *in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay.*

Id. at 544-545 (footnote omitted; emphasis added).

Although that passage suggests that a public employer concerned about the hazards posed by an employee staying in his duty station may satisfy due process by suspending the employee with pay, nothing in *Loudermill* indicates that a public employer *must* suspend with pay in every case to satisfy due process. Such a rule plainly conflicts with a long line of cases recognizing that due process is a flexible concept which calls only for those procedural protections demanded by the particular situation. See, *e.g.*, *Morrissey*, 408 U.S. at 481; *Cafeteria Workers*, 367 U.S. at 895.

Indeed, a suspension without pay generally entails far less weighty interests than a termination. Suspension involves an interruption, rather than a cessation, in pay; it reflects less seriously on the employee's reputation than does a termination for cause; and with respect to other benefits associated with employment, a suspension without pay generally will not have the same severe effects as a termination. In the federal system, for example, a suspension without pay does not interfere with life and health insurance coverage (unless the period of suspension exceeds one year), see 5 C.F.R. 870.501(d), 890.303(e), 890.502(b)(1), and credits for retirement benefits continue for a period of up to six months, 5 U.S.C. 8332(f).

b. The court of appeals' per se rule also gives no consideration to "the degree of potential deprivation that may be created by a particular decision," which the Court has identified as "a factor to be considered in assessing the validity of any administrative decisionmaking process." *Mathews*, 424 U.S. at 341; see also *Goldberg*, 397 U.S. at 263-264. At issue in *Mathews* was whether due process required that a disability benefit recipient be afforded an evidentiary hearing prior to the termination of his benefits. In concluding that it did not, the Court explained that "[s]ince a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim." *Mathews*, 424 U.S. at 340. The Court noted that the disability recipient's "potential injury [was] thus similar in nature to * * * the nonprobationary federal employee in *Arnett* [v. *Kennedy*, 416 U.S. 134, 146 (1974)]." *Ibid.* Although the Court acknowledged that the "hardship imposed upon the erroneously terminated disability recipient may be significant," it noted that the recipient could seek other forms of government assistance. *Id.* at 342; see also *Arnett*, 416 U.S. at 169 (Powell, J., concurring in part) (to overcome any temporary hardship public employee may rely on independent resources, secure a job in the private sector, or seek welfare benefits); *id.* at 201-202 (White, J., concurring in part and dissenting in part) (same).

The court below rejected the district court's conclusion that the deprivation suffered by Homar was "*de minimis*" because, although he ultimately received full backpay for the period of his suspension, "[f]or a period of approximately one month, Homar's

very livelihood was threatened because he received no salary," and because "[a]s far as Homar knew at the time of his suspension he had no prospects whatsoever of receiving any wages for the indefinite duration of his suspension." Pet. App. 16a. In our view, this Court's decisions do not support the proposition that the indefiniteness of the suspension without pay of a tenured public employee necessarily requires pre-suspension hearings so long as (a) the government's reasons for not conducting a presuspension hearing are weighty and (b) an opportunity to be heard is provided reasonably promptly after the suspension. There was no assurance that the suspension in *Mallen* would be limited in duration, yet the Court upheld post-deprivation procedures that were required by statute to occur within 90 days of the initial suspension. See 486 U.S. at 243. Similarly, in *Mathews*, the termination of disability benefits was indefinite, yet the Court concluded that pre-deprivation procedures were unnecessary since the administrative scheme provided for an exchange of written information before the termination and for post-deprivation procedures within six months. See 424 U.S. at 324, 349. In both cases the Court carefully weighed the government's justification for not providing pre-deprivation procedures against the private interests affected. As we explain in Part II, that balancing was never properly done by the courts below.

C. A Rule Requiring Pre-suspension Hearings In All Cases Could Threaten Legislative Choices Reasonably Made By Congress Affecting Federal Employees

A per se rule that public employees are entitled to hearings prior to being suspended without pay would risk intruding on congressionally mandated procedures that are not presented in this case.

1. Under the CSRA scheme for federal employees, a nonsupervisory or nonmanagerial probationary employee in the competitive service[13] (*i.e.*, an individual who has not completed one year of continuous service) may be suspended and/or terminated without prior notice and without any type of hearing.[14] See 5 C.F.R. 315.804 (agency "shall terminate [probationer's] services by notifying him in writing as to why he is being separated and the effective date of the action").

---

[13] An employee serving a probationary period in a supervisory or managerial position in the competitive service who does not satisfactorily complete the probationary period may be assigned to a position in the agency "of no lower grade and pay than the one the employee left to accept the supervisory or managerial position." 5 C.F.R. 315.907(a). The agency must provide written notice of the assignment to the employee (5 C.F.R. 315.907(c)), however, the employee generally has no right to appeal the assignment (5 C.F.R. 315.908(a)). But see 5 C.F.R. 315.908(b) (employee alleging that agency action was based on partisan political affiliation or marital status may appeal to MSPB).

[14] Pennsylvania law is to the same effect. See, *e.g.*, *Boykin* v. *Bloomsburg Univ.*, 893 F. Supp. 378, 395 (M.D. Pa. 1995) (state university was free to suspend, terminate, or take other disciplinary action against probationary employee without providing notice and opportunity to be heard as would be required with permanent, tenured employee).

Thus, while a federal agency must provide a probationary employee with written notice of his discharge, and the reasons for that action, such an employee has no statutory right to a pre-termination hearing.[15] See *United States Dep't of Justice, INS* v. *FLRA*, 709 F.2d 724, 727-728 (D.C. Cir. 1983) ("[i]n stark contrast to the * * * elaborate procedural protections available to those who have completed their probationary terms," CSRA provides only for summary termination of probationary employees). Tenured employees, on the other hand, have the right under the CSRA not to be suspended, demoted, or removed except "for such cause as will promote the efficiency of the service." 5 U.S.C. 7503, 7513. Such employees who are suspended without pay are afforded pre-deprivation notice and an opportunity to respond if the suspension is for less than 14 days; if the suspension is for more than fourteen days, such employees also are entitled by statute to a post-deprivation opportunity for a right to respond and a hearing. 5 U.S.C. 7503(b), 7513(b); 5 C.F.R. 752.203, 752.404. A federal employee's expectation of an uninterrupted stream of pay, therefore, is conditioned by Congress.[16]

---

[15] An exception to this general rule is when an agency proposes to terminate a probationary employee "for reasons based in whole or in part on conditions arising before his appointment." 5 C.F.R. 315.805. In such a case, the employee is entitled to advance written notice of the proposed termination and a reasonable time for filing a written response. 5 C.F.R. 315.805(a) and (b).

[16] Although the court of appeals noted the lack of a dispute between the parties as to the existence of a property interest, Pet. App. 9a, the nature and contours of that entitlement are not in the record, and the court's broad statement of the

2. Similarly, in the national security area, Congress has determined that an employee suspected of treason may be summarily suspended without pay. 5 U.S.C. 7532(a). In such a case, the employee (who is a citizen and has a permanent or indefinite appointment) is entitled to a post-suspension notice of the reasons for the suspension (but only to the extent that the agency determines that the interests of national security permit) and a post-suspension hearing. 5 U.S.C. 7532(c). Thus, in the national security context Congress has made a legislative judgment of the weighty governmental interests in an abbreviated process when the government has credible information that an employee has engaged in conduct that threatens national security.

In both the probationary employee and national security contexts, therefore, adoption of the court of appeals' per se rule would inappropriately cast doubt on the validity of federal statutory provisions in a case not properly before this Court.

II. THE CASE SHOULD BE REMANDED FOR CONSIDERATION OF THE ADEQUACY OF POST-SUSPENSION PROCEEDINGS

Our disagreement with the court of appeals' application of a per se rule does not in any way manifest disregard of the "'root requirement' of the Due Process Clause" that ordinarily an individual must be given an opportunity for a hearing "*before* he is deprived of a significant property interest." *Loudermill*, 470 U.S. at 542 (quoting *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971) (italics in *Boddie*). But

---

applicable rule for suspensions does not distinguish between tenured and non-tenured public employees. See Pet. App. 14a.

because the district court concluded that the deprivation of the property interest being asserted by Homar was "*de minimis*," Pet. App. 63a, and the court of appeals erroneously held that a public employee is always entitled to a hearing before being suspended without pay, neither court conducted the appropriate balancing of interests required by this Court's precedents. The case, therefore, should be remanded for further proceedings.

The record, for example, contains no explicit findings—and precious little evidence—as to the nature and extent of Homar's asserted loss. It does not, for example, reflect when he actually ceased being paid (*i.e.*, whether his pay stopped before he was given an opportunity to be heard), when the reduction in his pay took effect, and the extent of his actual deprivation prior to his being afforded a hearing. The record does not include the collective bargaining agreement that governs many of the parties' respective substantive and procedural rights. Nor does it reflect the reasons why petitioners suspended Homar without pay without providing a pre-suspension hearing. The district court appeared to assume interests in law enforcement integrity and public safety that address the suitability of Homar remaining in a duty status but that do not concern the appropriateness of his being suspended without pay. See Pet. App. 61a-62a.

In addition, assuming that the governmental interest may justify the postponement of a hearing on Homar's suspension, the court of appeals' decision did not address the adequacy and promptness of the post-deprivation process. "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify post-

poning the opportunity to be heard until after the initial deprivation." *Mallen*, 486 U.S. at 240; see also *Barry*, 443 U.S. at 64-65. The promptness of post-suspension hearing procedures is measured by balancing the importance of the private interest and the harm that the delay may cause to this interest, the justification given by the government for the delay and its relation to the underlying governmental interest, and the likelihood that the interim decision may have been in error. *Mallen*, 486 U.S. at 242.

Because the court of appeals incorrectly held that nothing less than a pre-deprivation hearing would ever pass constitutional muster and did not remand the case for evaluation by the district court of the factors specified in *Mathews* and its progeny, the judgment should be vacated. The case should be remanded for further development of the extent of the deprivation suffered by Homar; the appropriateness of the justifications for not affording Homar a hearing prior to his suspension without pay; and, if those justifications suffice, the adequacy of the post-suspension procedures provided by the university.

CONCLUSION

The judgment of the court of appeals should be vacated and remanded.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
SETH P. WAXMAN
Deputy Solicitor General
STEPHEN W. PRESTON
Deputy Assistant Attorney General
DAVID C. FREDERICK
Assistant to the Solicitor General
WILLIAM KANTER
JEFFRICA JENKINS LEE
Attorneys

LORRAINE P. LEWIS
General Counsel
MARY S. MITCHELSON
Deputy General Counsel
STEVEN E. ABOW
Senior Attorney
Office of Personnel Management

FEBRUARY 1997